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In the
Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER,
v.
LEROY CARHART, *ET AL.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALBERTO R. GONZALES, ATTORNEY GENERAL
PETITIONER,
v.
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *ET AL.*,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF CONSTITUTIONAL LAW PROFESSORS, DAVID L. FAIGMAN AND ASHUTOSH A. BHAGWAT, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DAVID L. FAIGMAN
ASHUTOSH A. BHAGWAT
200 McAllister Street
San Francisco, CA 94102
(415) 565-4600

KATHRYN M. DAVIS
Counsel of Record for Amici Curiae
530 South Lake Avenue No. 425
Pasadena, CA 91101
(626) 356-8059

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a group of law professors who teach and write in the area of constitutional law and who share a strong professional interest in issues relating to constitutional fact-finding and judicial review in constitutional cases. We seek to provide this Court with our professional academic perspective on these issues, as they arise in the cases at bar. Because our expertise does not extend to the substance of the underlying dispute - the medical value of a health exception to the Partial-Birth Abortion Ban Act of 2003 - we limit our analysis to the threshold question presented: What level of deference do courts owe Congress regarding congressional findings of fact that are relevant to determining whether federal legislation violates fundamental constitutional rights? We strongly believe that the position Petitioner advances here - that "[t]here is . . . no principled basis for holding that the degree of deference owed to congressional findings depends on the level of scrutiny applicable to the right at issue" (*Carhart* Br. for Pet. 25) - is fundamentally incorrect, inconsistent with almost a century of this Court's decisions, and, if adopted, will substantially undermine the structure of constitutional law.

SUMMARY OF ARGUMENT

The question of what level of deference is owed legislative findings of fact (whether made by Congress or by state legislatures) in constitutional litigation is not a new one. It divided this Court in First Amendment cases in the 1920s, and again arose in the 1940s in the Japanese-American Internment case. In the modern era, however, and contrary to the position Petitioner advances here, this

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[1] A list of interested *amici* is set forth in the Appendix. Pursuant to Rule 37.6, no counsel for a party has authored this brief and no person or entity, other than *amici* or their counsel, has made a monetary contribution to its preparation or submission. Letters of consent have been filed with the Clerk of Court.

Court has consistently refused to defer to legislative findings regarding facts and mixed questions of law and fact where, as here, the resolution of such questions serves to define the scope of a fundamental constitutional right. Put differently, when legislation is subject to heightened scrutiny because it burdens a basic right, this Court has always engaged in a searching, independent review of constitutionally relevant factual findings and conclusions. This is not to say that legislatures may not make factual findings that affect the scope of rights, or that courts should ignore such findings when they exist. To the contrary, legislatures should be encouraged to make such findings, and when courts are faced with the obligation to determine constitutional facts upon which legislative findings are based, they should accord due respect to the legislature's work. But judicial determinations of such facts should *not* be wholly deferential to legislative findings, nor are courts limited in their review to a record compiled by legislative bodies. Rather, courts must conduct an independent judicial review of legislative facts in constitutional cases and must remain free to gather and evaluate additional relevant facts, where they exist. A contrary rule would permit legislative bodies to evade and effectively overrule, through the guise of "fact-finding," the most critical decisions of this Court, thereby undermining this Court's preeminent role in constitutional interpretation mandated by *Marbury v. Madison*, 5 U.S. 137 (1803).

I. It is a basic and well-established principle of constitutional law that when a statute or other state action burdens a fundamental constitutional right, courts must engage in heightened review to determine the constitutionality of the government's actions. Such heightened review is sometimes described as "strict scrutiny," sometimes as "intermediate scrutiny," and sometimes by other descriptions such as the "undue burden" analysis set forth in *Planned Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Regardless, it is beyond dispute that where fundamental or other specially protected rights are implicated, judicial scrutiny is thorough, searching, and independent in determining both the applicable constitutional standard of law *and* in determining the relevant questions of fact and mixed questions of fact and law, which ultimately control the reviewing court's resolution of the constitutional claim.

The reason that heightened scrutiny mandates independent judicial review is that no other form of review can preserve the judiciary's preeminent role as interpreter of the Constitution, or duly recognize that the purpose of the Bill of Rights is to restrict, not enhance, legislative power. Petitioner's position in favor of deference in *all* cases, regardless of the constitutional nature of the rights and findings at issue, ignores these basic constitutional principles and threatens to empower legislatures through the guise of making "findings of fact" to overrule this Court's leading constitutional decisions, including *Brown v. Board of Education*, 347 U.S. 483 (1954) and *United States v. Eichman*, 496 U.S. 310 (1990).

This searching, independent review applies to *all* fundamental and other specially protected rights, and applies to *all* legislative conclusions and predicate findings of fact bearing on the definition and scope of the Constitution, whether made by Congress or by state legislatures. Insofar as Petitioner contends that Congress is due special deference not owed state legislatures (it is unclear whether Petitioner continues to defend this position), such an argument has no basis in this Court's jurisprudence, fails to achieve constitutional uniformity, and runs contrary to fundamental tenets of federalism.

II. The right to choose an abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973) and reaffirmed in *Casey*, is a specially protected constitutional right. As such, the level of scrutiny applicable to abortion regulations, including that

inherent in the "undue burden" test announced in the Joint Opinion in *Casey*, 505 U.S. at 876, is heightened scrutiny. Petitioner's reliance on *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), a case in which this Court did *not* employ heightened scrutiny, for the proposition that congressional findings of fact are owed deference regardless of the fundamentality of the constitutional rights at stake, is misplaced in two respects.

First, the undue burden test is not a form of intermediate scrutiny. Rather, notwithstanding this Court's recognition that governments possess powerful, compelling interests in regulating abortion, the undue burden test remains a form of strict scrutiny. Second, even if the undue burden test is roughly comparable to an intermediate level of review, it does *not* resemble the highly deferential form of intermediate scrutiny applied in *Turner II*. This Court's jurisprudence confirms that intermediate scrutiny comes in many forms, from the highly searching review employed in gender discrimination cases such as *United States v. Virginia*, 518 U.S. 515 (1996) and in modern commercial speech cases like *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), to the highly deferential form of review employed in *Turner II* and other cases involving content-neutral regulations of speech or symbolic conduct such as *United States v. O'Brien*, 391 U.S. 367 (1968) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). This Court's decision in *Casey*, striking down Pennsylvania's spousal notification requirement, and its recent decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), unequivocally confirm that the undue burden test is not a deferential form of scrutiny.

III. Where congressional findings of fact are determinative of the scope and reach of specially protected constitutional rights, courts must engage in an *independent* review of the relevant questions, including relevant constitutional and legislative facts. Constitutional facts are

invariably mixed questions of fact and law, the resolution of which serves to interpret the Constitution. Courts not legislatures uniformly retain control over the disposition of such questions. We do not suggest that legislatures have no role in finding facts relevant to constitutional interpretation, or that courts should ignore such findings. To the contrary, legislatures remain free to compile factual records supporting their enactments and, given the vast resources at the disposal of modern legislatures, and their institutional capacities to sponsor and supervise empirical research, courts should encourage the creation of such records. When engaging in independent review, courts should consider carefully, and give due respect to, the records and findings elected legislatures have made. Courts cannot, however, grant unfettered deference to legislative action, nor can they restrict their review to legislative records. Rather, courts must remain free to compile judicial records in litigation, engage in independent research, and rely on submissions of *amici*, in addition to reviewing whatever materials are compiled by legislative bodies. Any other approach would abdicate the judiciary's role as enforcer of constitutional constraints on legislative power, thereby leaving legislative foxes guarding the constitutional henhouse.

ARGUMENT

I. LEGISLATIVE ENACTMENTS THAT TRIGGER HEIGHTENED SCRUTINY BECAUSE THEY BURDEN SPECIALLY PROTECTED RIGHTS ARE SUBJECT TO SEARCHING, *INDEPENDENT* JUDICIAL REVIEW ON ALL ISSUES, INCLUDING QUESTIONS OF CONSTITUTIONAL FACT

At the heart of Petitioner's argument to this Court is the following proposition: "There is . . . no principled basis for holding that the degree of deference owed to congressional findings depends on the level of scrutiny applicable to the

right at issue."[2] That proposition is astonishingly incorrect. Indeed, it is the very essence of heightened judicial scrutiny that it is not only searching, but that it is *independent*, in contrast to the "normal" undemanding and deferential review courts accord legislation. That is precisely why heightened scrutiny is limited to situations where legislation has burdened fundamental or specially protected rights and is, therefore, presumptively suspect. To accept Petitioner's position in these cases would be to collapse the well-established tiers of review and, in so doing, eviscerate judicial protection for fundamental constitutional liberties.

A. This Court Has Long Recognized That Heightened Scrutiny Constitutes A Form Of Searching, *Independent* Judicial Review

The question of what level of deference should be accorded to legislative findings has arisen regularly since the very beginnings of this Court's modern jurisprudence of fundamental rights. In *Gitlow v. New York*, 268 U.S. 652 (1925), faced with a First Amendment challenge to New York's Criminal Anarchy Statute, a majority of this Court affirmed Benjamin Gitlow's conviction based on his involvement in the publication of the "Left Wing Manifesto." According to the majority, by enacting the present statute: "the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute." *Id.* at 668. Two years later, this Court, relying on this statement in *Gitlow*, proceeded to also affirm Anita Whitney's conviction under

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[2] *Carhart* Br. for Pet. 25.

California's Criminal Syndicalism Act. *See Whitney v. California*, 274 U.S. 357, 371 (1927). This decision elicited a separate opinion by Justice Brandeis, joined by Justice Holmes, which is widely considered to be one of the most influential opinions in the history of this Court and which has been described by Professor G. Edward White as "launch[ing] the project of bifurcated constitutional review." G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 326 (1996).

In *Whitney*, Justice Brandeis has this to say about the majority's holding on deference: "where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity." *Id.* at 374 (Brandeis, J., concurring). Later, Brandeis emphasized that a legislative declaration regarding social danger "does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions exist which are essential to validity under the Federal Constitution." *Id.* at 379. In short, Brandeis recognized that if individual liberties were to be preserved, independent judicial review of *facts* was essential. This Court has since acknowledged that "there is little doubt that subsequent opinions [of the Court] have inclined toward the Holmes-Brandeis rationale." *Dennis v. United States*, 341 U.S. 494, 507 (1951); *see also Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Whitney*).

In modern times, Justice Brandeis's basic insight in *Whitney*, that when fundamental liberties are at stake independent judicial scrutiny is essential, has been realized through the concept of tiers of scrutiny. In a wide variety of constitutional contexts, this Court has established various substantive tests that differ in their rigor depending on the depth of the constitutional right involved. Hence, in Due Process, Equal Protection, and First Amendment cases, this Court ordinarily applies strict scrutiny when fundamental

or specially protected rights are implicated, but only rational basis review when the right is non-fundamental. *See generally* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997). This "tailoring" analysis is principally empirical, and courts' deference to legislative fact-finding diminishes in direct proportion to the fundamentality of the right. *See generally*, Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33-36 (1972). Under strict scrutiny, the government must demonstrate that the law is narrowly tailored to achieve a compelling government interest. Under rational basis review, courts determine merely whether the law is rationally related to a legitimate government interest. Simply put, tiered scrutiny operates on a sliding scale such that the more fundamental the right, the greater the degree of scrutiny courts bring to bear in evaluating alleged infringements of those rights.

Unfortunately, this constitutional terrain is not entirely free of ambiguity. Although basic doctrine often distinguishes in theory between strict scrutiny and rational basis review, the actual practice by which courts safeguard basic liberties is rather more complicated. Two complications, in particular, are worthy of note. First, over the last thirty years, this Court has regularly departed from a strict and categorical approach to two-tiered scrutiny. The clearest example is this Court's adoption of intermediate scrutiny in several constitutional contexts, including gender discrimination, regulation of commercial speech, and content-neutral regulations of symbolic conduct or speech. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976) (gender); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (commercial speech); *O'Brien*, 391 U.S. 367 (symbolic conduct); *Rock Against Racism*, 491 U.S. 781 (content-neutral speech regulation).

The second complication is that in different constitutional contexts the intermediate scrutiny test is manifested in different ways. In *United States v. Virginia* (the VMI case), this Court applied intermediate scrutiny but noted that the government must have an "exceedingly persuasive" justification for discriminating on the basis of gender. 518 U.S. at 531. In contrast, the test applied in symbolic conduct cases such as *O'Brien* is notably less rigorous, and has been described as not being an "enhanced level of scrutiny" at all, but rather as resembling rational basis review. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578-579 (1991) (Scalia, J., concurring in the judgment). Intermediate scrutiny, as a practical matter then, has become something of a catchall for a constitutional domain ranging from rational basis analysis with bite to strict scrutiny that is not invariably fatal in fact. The designation of "intermediate scrutiny" alone, therefore, proves to be neither exact nor especially helpful.

Regardless of precise terminology, however, in the modern era this Court has consistently applied *heightened* scrutiny to laws that burden specially protected rights in a searching and independent manner, without deferring in any way to legislative judgments of fact or law. This tendency is most obvious in First Amendment cases. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978), this Court specifically reversed the Supreme Court of Virginia's deference to legislative fact-finding, holding that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* at 844 (*citing Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) ("[The Court is] compelled to examine for [itself] the statements in issue and the circumstances under which they were made.")). According to the *Landmark* Court, if legislative findings were accorded deference, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First

Amendment as a check on legislative power would be nullified." *Id.* at 844.

Just recently, a plurality of the Court in *Randall v. Sorrell*, 126 S.Ct. 2479 (2006), rejected Vermont's claim that courts should be deferential to state legislative findings of fact regarding whether campaign contribution limits "prevented candidates . . . from 'amassing the resources necessary for effective [campaign] advocacy,'" and thus "are too low and too strict to survive First Amendment scrutinty." *Id.* at 2492 (*quoting Buckley v. Valeo*, 424 U.S. 1, 21, (1976 (per curiam)). Justice Breyer duly recognized that legislatures are "better equipped to make such empirical judgments, as legislators have "'particular expertise' in matters related to the costs and nature of running for office." *Id.* (*quoting McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 137 (2003)). Neverthless, and despite the virtually unique expertise possessed by legislators in this particular context, Justice Breyer found that it was incumbent upon courts to exercise "independent judicial judgment," and "review the [factual] record independently and carefully" to ensure that the statutory restrictions at issue comported with the Constitution. *Id.*

The issue of deference to legislative findings – in this case, congressional findings – also arose in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). In *Sable*, the government argued that this Court should defer to congressional fact findings regarding the necessity of a complete ban on speech to achieve Congress's regulatory interests. This Court's response, in an opinion this part of which was unanimous, was to unambiguously reject that argument, stating that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law" (though the Court went on to recognize that Congress had in any event made no findings on the relevant question). *Id.* at 129. Even more recently, in *Reno v. ACLU*, 521 U.S. 844, 875 (1997), this Court reaffirmed its holding in

Sable in which "this Court rejected the argument that we should defer to the congressional judgment" regarding the necessity of a particular act of legislation.

This Court has also explicitly recognized the need for nondeferential review outside the First Amendment context. Notably, in *United States v. Virginia*, this Court reversed the lower court's deference to legislative conclusions regarding the equality of all-female and all-male educational programs, stating that "[t]he Fourth Circuit plainly erred in exposing Virginia's VWIL plan to a deferential analysis for 'all gender-based classifications today' warrant 'heightened scrutiny.'" 515 U.S. at 555-556 (*quoting J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). *United States v. Virginia*, it should be noted, was a case involving intermediate scrutiny, and this Court clearly stated that such scrutiny constitutes "heightened scrutiny" requiring nondeferential analysis. *Id.*

Finally, while the above cases clearly establish the proposition that heightened scrutiny contemplates some degree of independent, nondeferential review, they are merely the tip of the iceberg. In a myriad of cases, across the range of constitutional analysis, this Court has applied heightened scrutiny in an independent and searching manner, often with the consequence of striking down legislation, and without expressly addressing the question of deference. *See, e.g., City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Western States*, 535 U.S. 357. All serve to confirm the basic logic of tiered scrutiny - th at different levels of scrutiny are accorded different, correspoding levels of deference such that the greater the core right implicated the more searching the judicial review must be.

B. *Independent* Review Extends To Questions Of Legislative And Constitutional Fact

As demonstrated above, in the modern era, this Court has consistently held that when a legislature burdens fundamental freedoms and thereby triggers heightened

judicial scrutiny, such scrutiny must be searching as well as independent and nondeferential. Furthermore, the concept of independent review includes review of purely legal questions as well as factual ones. There is another, equally compelling reason that deference to legislative fact-finding is inappropriate in constitutional cases. Specifically, the factual issues toward which deference is claimed in constitutional litigation are typically not questions of adjudicative fact, but rather questions of legislative, constitutional fact, the resolution of which bears directly on the definition and scope of core constitutional rights and, thus, the Constitution itself.

The question whether a health exception to a regulation of pre-viability abortions is necessary raises an issue of "legislative fact." Professor Kenneth Culp Davis coined the term "legislative fact" in an effort to distinguish such facts from "adjudicative facts." Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942). Adjudicative facts are those facts particular to a specific litigated dispute. Legislative facts, according to the Advisory Committee Note to Federal Rule of Evidence 201(a), "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. R. EVID. 201(A) (Advisory Committee Note). In general, the rules of evidence for finding facts that form the basis for creation of law and policy differ from the rules for finding facts specific to parties in a particular case. *See* Davis, *supra*, at 402; *see also* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 PA. L. REV. 541, 552-56 (1991). Whereas adjudicative facts are decided by triers of fact and concern only the immediate parties to the dispute, legislative facts transcend particular cases and must be decided by courts as a matter of law.

Facts that are employed to substantiate the validity of legislation are, by definition, "legislative facts." When such legislation burdens fundamental rights, the legislature's factual premises must be subjected to independent judicial scrutiny. Logic permits no contrary conclusion, if judicial review is to have any meaning at all. In *Casey*, this Court invalidated the spousal notification provision on the ground that in some small but significant percentage of cases this requirement would subject women seeking to terminate their pregnancies to domestic abuse. *See Casey*, 505 U.S. at 888-93. The authors of the Joint Opinion were persuaded by social science research indicating that some women would be battered if they had to comply with this regulation. *Id.* This factual finding was based on both the trial record and research authority provided by *amici*. *Id.* The Court found this fact at the "legislative" level, in that the finding applied to all cases and, in so doing, established a uniform constitutional rule. *Id.* As a consequence, and based on its independent legislative fact review, this Court ruled, as a matter of law, that spousal notification provisions placed a substantial obstacle in the path of women seeking to terminate their pregnancies. Almost certainly, this Court did not mean to leave open the possibility that a particular legislature or lower court could overturn its decision merely by making "findings" that the risk of domestic violence is in fact *de minimis*.[3]

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[3] Petitioner argues that Congress has the authority to revisit this Court's decisions when the facts on which those decisions depend have changed. *Amici* do not disagree with this general proposition. Indeed, as we argue below (Part III), Congress's vast capacity to find facts should be encouraged. If Congress believes that subsequent developments cast doubt on the factual premises of one of this Court's decisions, then it, as a coordinate branch of government, is free to act accordingly. Nonetheless, it remains this Court's obligation to independently review such actions, as well as any accompanying fact-finding, when they infringe fundamental liberties. *Cf. Roper v. Simmons*, 543 U.S. 551 (2005) (Missouri Supreme

Beyond the legislative character of the essential facts in these cases, there is an even more fundamental, equally compelling reason for close judicial scrutiny. Petitioner argues that the question of whether a health exception is constitutionally necessary is a "pure fact" that does not implicate constitutional values. We disagree. The question of the need for a health exception is a *constitutional* fact. Specifically, the answer to this factual question critically affects the meaning of a guarantee of basic liberty, which this Court has found to exist. Constitutional facts are invariably mixed questions of fact and law, the resolution of which serves to interpret the Constitution and warrants independent nondeferential review. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984). Indeed, virtually every constitutionally relevant fact helps define the scope and meaning of the Constitution itself. Examples are numerous. *See Brown*, 347 U.S. 483 (the effects of segregation); *Roe*, 410 U.S. 113 (the point at which a fetus becomes viable); *Lee v. Weisman*, 505 U.S. 577 (1992) (the psychological coercion inherent in a graduation invocation and benediction); *New York v. Ferber*, 458 U.S. 747 (1982) (the effects of child pornography); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (the secular basis, if any, of creation science); *Miller v. California*, 413 U.S. 15 (1973) (the artistic or literary value of alleged obscenity). Because constitutional facts are mixed questions of fact and law, and because they profoundly shape the legal effects of constitutional provisions, they must be resolved as a matter of law. *See Bose*, 466 U.S. at 501. Courts, not legislatures or other finders of fact, always retain control over the disposition of such questions of law at every level of the judicial process.

Court distinguished this Court's precedent in concluding that standards of decency had evolved such that executing someone who had committed a capital offense as a juvenile no longer comported with Eighth Amendment guarantees).

See generally David L. Faigman, *Fact-Finding in Constitutional Cases* in HOW LAW KNOWS (Austin Sarat et al., eds. 2006). As such, under heightened scrutiny, independent review of constitutional fact-finding is an integral element of this Court's constitutional obligations.

There is a basic illogic to Petitioner's contention that federal courts should be largely deferential to a legislature's fact-finding in abortion cases. The undue burden standard is the applicable test for assessing the constitutionality of legislative actions under the Constitution, just as strict scrutiny is the test for assessing the constitutionality of race-based legislative classifications. Regulations that implicate this core, specially protected right, are subject to heightened scrutiny. Congress is thus prohibited from passing a law that places "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Yet Petitioner asserts that courts must defer to Congress's factual findings regarding the evidence that dictates whether its own law creates a substantial obstacle. But it would not be much of a test of congressional action if courts had to defer to Congress's judgment of whether the disputed law passes the test. *Cf. Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

In most constitutional cases involving basic rights, the guarantee of the right itself can be manipulated by alternative findings of fact. For that reason, just as a legislature could not alter the scope of Equal Protection guarantee identified in *Brown v. Board of Education* by finding as a matter of fact that segregated schools *advantage* African-Americans, Congress cannot evade the constitutional guarantees of *Roe* and *Casey* by finding, unilaterally and categorically, that its laws do not pose a health risk to women. *See Stell v. Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55 (5th Cir. 1964), *rev'g Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga. 1963) (reversing district court's finding of fact that

school segregation does not injure black children and concluding that the effects of segregation as determined in *Brown* are unassailable legislative facts).

Structural separation of powers also suggests that whether Congress has violated the Constitution in this case cannot depend on Congress's own determination of this question. Chief Justice John Marshall's words in *Marbury v. Madison* apply in full force to this matter:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation....

Marbury, 5 U.S. at 176-77. Marshall then added these famous words: "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* In the instant case, the constitutionally relevant findings of fact will effectively "say what the law is," and thus cannot be left to Congress alone to determine.

Because the empirical question regarding the necessity of a health exception is tightly connected to the due process right itself - and largely dictates the constitutional issue of whether the law constitutes an "undue burden" - it presents a mixed question of fact and law, or a *constitutional* fact, which must be subjected to independent judicial review. Because its resolution inevitably affects the definition of the core right to abortion, the fact-finding necessary to determine whether a health exception is needed (as well as Congress's conclusion that it is not) is a basic component of the judiciary's obligations under the Constitution. In finding that a health exception is, as a matter of fact, never

medically necessary, Congress has essentially defined out of existence a critical component of a basic right this Court has recognized as a matter of law and, more fundamentally, has concluded for itself that the underlying right is not burdened. The ultimate conclusion whether the law constitutes an "undue burden," however, must be a product of this Court's independent legal judgment.

C. Congressional Fact Findings Warrant The Same Deference As State Legislative Findings

Petitioner originally argued that special deference is due legislative findings of fact in this case because it involves a challenge to a federal statute enacted by Congress, rather than to state legislative action. *See Carhart* Pet. 15 (distinguishing *Stenberg* because it was a "case in which there was no federal statute at issue"). In its merits brief, Petitioner does not clearly pursue this argument, indicating that it has perhaps been abandoned. However, Petitioner's brief does suggest, somewhat obliquely, that special "binding" deference is due because it is *Congress* (presumably in contrast to state legislatures) that has made the factual findings here (*see Carhart* Br. for Pet. 6, 10, 13, 21-23, 25-26 & n.7), and attempts to again distinguish *Stenberg* on the grounds that "the statute at issue here is an Act of Congress accompanied by congressional findings." *Id.* at 43. Any argument that congressional findings are owed special deference not due to the findings of state legislatures is contrary to fundamental tenets of federalism and has no basis in the jurisprudence of this Court.

The reason Congress and state legislatures should not be treated differently when analyzing constitutionality is simple. When duly elected state legislatures act within their proper sphere of legislative authority, their enactments are entitled to the same respect, and possess the same democratic legitimacy, as congressional statutes. That is a basic assumption of our federal system, which Petitioner's argument ignores. Furthermore, like Congress, state

legislatures control institutional mechanisms, such as legislative hearings, which can be used to gather information. Petitioner's position turns federalism on its head by empowering Congress, and disempowering the states, to legislate in areas of moral regulation, such as abortion and indecency, where state authority has traditionally been considered preeminent.[4]

If Petitioner's deferential standard of review were adopted in this case, it would, therefore, apply with equal force to state and federal legislative fact findings. As a consequence, different legislatures could find different facts predicated on essentially the same record and these disparate findings would be upheld by the courts. In other words, the deferential standard advocated by Petitioner might require this Court to sustain conflicting findings regarding whether a particular regulation creates an undue burden because, in close cases, both empirical positions could be "reasonable and supported by substantial evidence." *See United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996) (noting that when a determination is left to the discretion of other decision makers, it is possible for them to come to different conclusions and for the appellate courts to affirm variable outcomes under a deferential standard of review). Such a result would leave different jurisdictions with inconsistent constitutional practices notwithstanding the fact that the empirical issue, or the relevant constitutional fact, is identical in each of them.[5]

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[4] This is not to say that federal and state legislation must always be treated similarly. Certainly, in areas such as foreign affairs and national security, where the Constitution grants special powers to the national government, and where separation of powers dictates a reduced judicial role, special deference to Congress may be appropriate. This principle distinguishes *Rostker v. Goldberg*, 453 U.S. 57 (1981), one of the few cases Petitioner relies on for its deference argument.

[5] This is unlike the situation in which inconsistency results because the facts differ from place to place. This typically occurs in cases in which the

Petitioner fails to advance any persuasive reason why this Court should adopt a rule that so fundamentally undermines constitutional uniformity.

Indeed, this Court's holding in *Stenberg* implicitly recognized the danger of allowing inconsistent findings and compels the conclusion that the necessity of a health exception must be found at the level of constitutional fact – not amenable to alteration by the fact-finding of individual legislatures. *See Stenberg*, 530 U.S. at 934. Courts of Appeal have explicitly recognized the need for facts to be found at the legislative level when evaluating abortion legislation. *See, e.g., Hope Clinic v. Ryan*, 195 F.3d 857, 884 (7th Cir. 1999) (Posner, J., dissenting) ("The health effects of partial birth abortion should indeed be treated as a legislative fact, rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges...to different records."), *vacated by* 530 U.S. 1271 (2000); *A Woman's Choice - East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) ("[C]onstitutionality must be assessed at the level of legislative fact, rather than adjudicative fact determined by more than 650 district judges. Only treating the matter as one of legislative fact produces the nationally uniform approach that *Stenberg* demands."). Courts simply cannot defer to legislative fact-finding where, as here, a uniform constitutional rule is indicated.[6]

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relevant constitutional fact is an adjudicative fact. Under The *Miller* test, for example, it would be possible for the same photograph to be found obscene in one locale but not another, since one prong of the test is tied to "contemporary community standards." *Miller*, 413 U.S. at 24.

[6] An analogous situation was presented in *Lockhart v. McCree*, 476 U.S. 162 (1986). Although this Court did not decide the case based on the factual issue, Justice Rehnquist observed, "[w]e are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here." He explained, "[t]he difficulty with applying such a standard to 'legislative' facts is evidenced here by

II. THE RIGHT TO CHOOSE AN ABORTION IS A CORE CONSTITUTIONAL RIGHT, WHICH TRIGGERS HEIGHTENED SCRUTINY

Aside from Petitioner's clearly incorrect claim that courts must defer to congressional findings regardless of the level of scrutiny they apply, the primary basis for its claim of deference is that "the undue-burden standard . . . closely resembles an intermediate-scrutiny standard" (*Carhart* Br. for Pet. 25), such that deferential review applies. That argument is plainly wrong in two respects. First, the undue burden standard is not a form of intermediate scrutiny, but rather a different test altogether and one that requires heightened scrutiny by this Court. Second, even if the undue burden standard might be considered comparable to *some* forms of intermediate scrutiny, it certainly does not resemble the highly diluted form of scrutiny applied in the two *Turner* cases Petitioner cites in support of its substantial deference standard.[7]

A. The Undue Burden Test Constitutes A Form Of Heightened Judicial Scrutiny

It is clear, as a simple matter of linguistics, that the undue burden test is not merely another way of describing intermediate scrutiny. If this Court had wanted to employ intermediate scrutiny in the abortion context, it certainly knew what words would have accomplished that result. The basic statement of intermediate scrutiny is well described in the case law: a law passes intermediate scrutiny if it is substantially related to an important government interest. *See Craig*, 429 U.S. at 197-98. Applying

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the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the [court below]." *Lockhart*, 476 U.S. at 170 (*citing Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (*en banc*) (plurality opinion of Reavley, J.)).

[7] *See Carhart* Br. for Pet. 21-22, 24-26.

this test, a reviewing court is obligated to evaluate the importance of the government's stated objectives and assess whether the means are substantially likely to achieve those ends. The undue burden standard posits a different question. It asks whether the government's action creates a substantial obstacle to the exercise of the abortion right. These two tests call for distinct inquiries and there is no authority whatsoever to suggest that the undue burden test is functionally equivalent to intermediate scrutiny.

It is also clear as a jurisprudential matter that Petitioner errs in equating the undue burden standard with intermediate scrutiny: Petitioner has undervalued the underlying right implicated by the disputed law. Close inspection of *Casey* and *Stenberg* indicates that the depth of the right of reproductive choice is comparable to that of traditional fundamental rights protected by strict scrutiny. In *Roe v. Wade*, this Court held that privacy, which included a woman's right to terminate her pregnancy prior to viability, was located in the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court went on to treat this right as fundamental and sufficient to trigger strict scrutiny, concluding that only at viability does the State's interest become sufficiently compelling to override the right. *See Roe*, 410 U.S. at 153-54. Although this Court has substituted the undue burden test for the trimester framework, it has never intimated that its view of the fundamentality of the underlying right has changed. The Joint Opinion in *Casey* and the majority in *Stenberg* repeatedly expressed their fidelity to this "central tenet" of *Roe v. Wade*. *Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."); *Stenberg*, 530 U.S. at 920 ("[T]he Constitution offers basic protection to the woman's right to choose."). Thus, this Court's established (and, in this case, unchallenged) precedents clearly hold that the

right of reproductive choice was, and is, a specially protected core constitutional right.

The reason that the *Casey* plurality substituted the undue burden test for traditional strict scrutiny was not that it was down-grading the core nature of the right, but rather that it considered the undue burden test to constitute "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Casey*, 505 U.S. at 875-76 (expressly noting that the *Roe* Court "undervalue[d] the State's interest in the potential life within the woman."). At no point does *Casey's* Joint Opinion or *Stenberg* remotely suggest that a woman's right is less than fundamental or that *Roe's* holding to that effect is in any way diminished or disapproved. Thus, notwithstanding *Casey's* modification of the applicable test, the underlying right continues to be counted as a specially protected constitutional right that triggers close judicial scrutiny of laws that would infringe it.[8]

B. Petitioner's Cases In Support Of Deference Are Distinguishable As They Did Not Involve True, Heightened Scrutiny

Even assuming the undue burden test is roughly comparable to an intermediate level of review, Petitioner's proposed standard is considerably more deferential than that applied under ordinary intermediate scrutiny. Petitioner's deferential standard is employed in constitutional cases in which core constitutional rights are only incidentally infringed and not, as here, the target of legislative action. Petitioner asserts that this Court should

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[8] Indeed, despite its surface claims to the contrary, Petitioner implicitly concedes the fundamentality of the right of choice. Repeatedly, Petitioner defends Congress by citing "the government's compelling interests" that are advanced by the statute. *See Carhart* Br. for Pet. 13; *see also id.* at 11, 41, 42. This, of course, is the language of strict, not intermediate scrutiny.

defer to congressional findings regarding the necessity of a health exception so long as "Congress has drawn reasonable inferences based on substantial evidence." *Carhart* Br. for Pet. 21 (*quoting Turner II*, 520 U.S. at 195 (*quoting Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (*Turner I*))). But this language is inapposite in the cases at hand, because neither *Turner I* nor *Turner II* employed the kind of heightened scrutiny applicable to abortion regulations.

The deference applied in the *Turner* cases must be understood against the backdrop of this Court's proper and longstanding reluctance to impose its opinions on Congress concerning questions of economic policy, at least when congressional actions do not *directly* burden constitutional rights. When a regulation *does* directly burden a constitutional right, however, this Court does not defer to Congress, even if the regulation might be described as an "economic" one. The *Turner* deference standard is thus doubly inapplicable here, both because the statute here is not economic, and because it directly burdens a basic right.

The fundamental premise underlying the deference accorded to Congress in *Turner* is the idea that, absent a direct burden on constitutional rights, economic policy must be formulated by elected legislatures, not the courts. As Justice Holmes recognized over a century ago, "the constitution is not intended to embody a particular economic theory, . . . it is made for people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). Since the abandonment of *Lochner* in 1937, this Court has consistently recognized that the only legitimate means to reconcile these divergent views is for fundamental economic policy decisions to be made legislatively. This Court has also consistently recognized, however, that when Congress *does* burden fundamental rights, deference is not in order. *Compare United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1937) ("regulatory legislation affecting ordinary commercial transactions is not

to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators") *with id.* at 153 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

The two *Turner* cases involved a congressional effort to implement an economic policy reconciling the needs of the cable television and broadcast industries, which did *not* directly burden a constitutional right. Both cases concerned portions of the Cable Television Consumer Protection and Competition Act of 1992, requiring cable television systems to devote a portion of their channels to the re-transmission of local broadcast television stations. Reasoning that the Act was a content-neutral regulation with an incidental effect on speech, *Turner I* applied the test laid out in *United States v. O'Brien*, 391 U.S. 367. Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. *O'Brien's* approach was itself deferential. Such deference followed from the fact that the challenged law did not target free speech, but rather was a content-neutral regulation of non-speech activity that only incidentally affected expression. *See* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, The New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 169-70 (1995). This deferential *O'Brien* standard, applied again in *Turner II* after remand, provides the necessary context for understanding Justice Kennedy's

observation that "deference must be accorded to [Congressional findings to avoid infringing on] traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner II*, 520 U.S. at 196.

As noted above, however, the highly deferential form of review applied in *O'Brien* (and in the related line of cases, epitomized by *Ward v. Rock Against Racism*, 491 U.S. 781, which involve time, place, and manner regulations of the public forum) has *not* been applied in other contexts where true heightened scrutiny is required. This lack of deference is most obvious in cases such as *Sable*, *Reno v. ACLU*, and *Croson*, applying strict scrutiny. *See* Part I.A., *supra*. Indeed, in the *Turner* cases themselves, this Court recognized that deference would not have been due if the congressional legislation at issue directly targeted a core right. Justice Stevens's concurrence in *Turner I* makes the matter clear: "[T]he factual findings accompanying economic measures that are enacted by Congress itself and that have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech. . . ." *Turner I*, 512 U.S. at 671 n.2 (Stevens, J., concurring). Again, in *Turner II*, Justice Stevens wrote briefly in his concurrence to reiterate that:

> [T]he policy judgments made by Congress in the enactment of legislation that is intended to forestall the abuse of monopoly power are entitled to substantial deference, [even when] the attempt to protect an economic market imposes burdens on communication. *If this statute regulated the content of speech rather than the structure of the market, our task would be quite different.*

Turner II, 520 U.S. at 225 (Stevens, J., concurring) (emphasis added) (internal citations omitted).

Further, contrary to Petitioner's claims it is clear that even in cases applying what is described as "intermediate scrutiny," this Court does not always defer to legislative findings. This is most obvious in Equal Protection cases applying intermediate scrutiny to gender classifications, where this Court has paid little heed to legislative findings. *See Craig*, 429 U.S. at 200-01 (dismissing statistics offered to support state legislation imposing a different minimum age, based on gender, for purchasing beer as weak, inaccurate, and failing to closely serve the objectives of the legislation); *United States v. Virginia*, 518 U.S. at 542-43 (dismissing the testimony of Virginia's experts that the admission of women to the all-male Virginia Military Institute would be so radical as to destroy the program as an unproven judgment, "a prediction hardly different from other 'self-fulfilling prophec[ies]' once routinely used to deny rights or opportunities.") (citations omitted). Similarly, in recent cases applying intermediate scrutiny to regulations of commercial speech, this Court has independently reviewed the record and refused to defer to legislative enactments. *See, e.g., Lorillard*, 533 U.S. 525; *Western States*, 535 U.S. 357.

Indeed, Petitioner's brief is notably short on citations to cases where this Court deferred to congressional findings while applying true, heightened scrutiny to violations of fundamental substantive rights. Instead, Petitioner cites to one case involving military policy, where special deference has always been accorded Congress,[9] cases involving procedural due process claims,[10] a plurality opinion in an Establishment Clause case where deference was clearly not necessary to the result,[11] and one case dating from 1926,

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[9] *See Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

[10] *See Jones v. United States*, 463 U.S. 354, 364 (1983); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

[11] *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

which involved review for reasonableness of express congressional power and which involved neither express congressional findings of fact nor fundamental constitutional rights.[12] Petitioner fails to cite a single case in which this Court categorically deferred to legislative findings of fact that determine the scope and meaning of a fundamental constitutional right. Further, while it may be true that this Court does not lightly second-guess legislative judgments, that is not to say that all such judgments, including those resolving medical and scientific uncertainties, are immune from independent judicial review or that they must be upheld on a mere showing of reasonableness.

III. UNDER HEIGHTENED SCRUTINY, QUESTIONS OF FACT AND MIXED QUESTIONS OF FACT AND LAW ARE REVIEWED *INDEPENDENTLY*

When measuring the constitutionality of legislation, this Court consistently substitutes its own factual determinations for those made legislatively. While the Court is not always explicit when it second-guesses a legislature's factual basis for its lawmaking, holdings that rest upon a less than deferential treatment of legislatively found facts cut a broad swath across constitutional law. When basic rights are at issue, courts must not defer to legislative fact-finding, but rather must engage in a searching and *independent* form of review. Our proposed standard of independent review differs from the traditional *de novo* standard of review. Courts owe due respect to legislative fact-finding and legislatures should be encouraged to collect data, hold hearings and otherwise discover the empirical consequences of legislation that impacts basic rights. Courts should duly consider this research in their constitutional deliberations. This approach

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[12] *See Lambert v. Yellowley*, 272 U.S. 581, 589, 594-95 (1926).

is more consistent with a properly formulated standard of independent review than what a true *de novo* test would mandate.

Indeed, this Court has repeatedly extolled Congress's fact-finding capabilities, and of legislatures more generally. This compliment to Congress's empirical acumen is a function of both respect for a coordinate branch of government and recognition that legislators typically have greater resources at their disposal than do judges. Legislators can sponsor research, hold hearings, and call expert witnesses. They also have great flexibility to refine their research questions and redefine the scope, direction and size of any inquiry. As Justice Souter observed in *Washington v. Glucksberg*, 521 U.S. 702, 788 (1997), legislatures "have more flexible mechanisms for fact-finding than the Judiciary," as well as "the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions." Courts, by comparison, are more limited because they cannot initiate or fund research and the factual questions that come before them are fairly well-defined by the parties or controlling law. Judges, unlike legislators, rarely question witnesses and usually do not specify which experts are called to testify. These institutional differences have led this Court to express its preference for congressional fact-finding and to recognize its own limited capacity to match the resources legislatures bring to fact-based inquiries. *See* DAVID L. FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW (2004).

While the power of Congress to find facts must be duly recognized, this does not necessarily affect the standard of review courts bring to congressional fact-finding. Courts too are fact finders. Congress may excel in defining and financing research, but courts excel at hearing controverted evidence and reaching a decision free of partisan influence. The federal courts, insulated from the shifting political tides,

are able to evaluate the evidence in a systematic and careful fashion. District courts hear the evidence and accordingly must evaluate the credibility of witnesses and the reliability and validity of proffered expert testimony. Moreover, there is rarely a shortage of proffered qualified expert opinion particularly, where as here, factual questions turn largely on disputed medical issues and expert evidence regarding medical practice and professional opinion. While the judiciary may not be as well designed institutionally as Congress to *gather* these data, courts are especially well designed to *evaluate* them.[13] District courts are well complemented in this process by appellate courts, which have access to both the trial record and interested third-party *amicus* briefs.

As the cases at bar well illustrate, courts have the wherewithal to make independent judgments regarding the factual propositions that imbue constitutional cases. This Court has the full legislative records before it, as well as the benefit of extensive expert testimony from the trial courts below. Moreover, the expert opinions were initially admitted under the critical auspices of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and further subjected to the rigors of adversarial testing. Finally, the legislative records at issue here are buttressed by a bounty of *amicus* briefs regarding the factual issues at hand. Simply on the basis of institutional competence, therefore, courts are well positioned to make independent judgments regarding disputed constitutional facts.

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[13] Indeed, there are reasons to doubt whether Congress's institutional capacity for fact gathering is matched by its institutional incentives for accurate fact-finding. *See* Neal Devins, *Constitutional Factfinding and the Scope of Judicial Review* in CONGRESS AND THE CONSTITUTION (Neal Devins and Keith E. Whittington, eds. 2005).

Adopting a nondeferential standard of review in constitutional cases involving fundamental liberties will not dissuade legislatures from compiling a full record. Indeed, given the need in these cases to meet a rigorous standard of review, legislatures can be expected to do more to ensure a full factual record. Congress should continue to gather facts, hold hearings, sponsor research, and otherwise inform itself and future interested parties of the empirical reasons for its action. Courts should give due consideration to the factual findings gathered by Congress. But courts cannot be overly deferential to such fact-finding, lest they abdicate their responsibility under the Constitution.

CONCLUSION

When legislative enactments burden fundamental constitutional rights, and therefore trigger heightened review, a reviewing court must engage in an independent, searching review of *all* the issues raised, including issues of legislative and constitutional fact. This Court has consistently engaged in such independent review in cases involving fundamental rights in the modern era, and has also recognized that independent review is essential if the judiciary is to retain its preeminent role in interpreting and enforcing constitutional restrictions on legislative power. Reviewing courts can and should take account of, and give due respect to, legislative findings relevant to the factual questions at issue; but by no means does such respect require the form of deference Petitioner advocates here.

Respectfully submitted,

DAVID L. FAIGMAN
ASHUTOSH A. BHAGWAT
200 McAllister Street
San Francisco, CA 94102
(415) 565-4600

KATHRYN M. DAVIS
Counsel of Record for Amici Curiae
530 South Lake Avenue No. 425
Pasadena, CA 91101
(626) 356-8059

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APPENDIX

INTERESTED *AMICI CURIAE*

DAVID L. FAIGMAN
Distinguished Professor of Law
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4600

ASHUTOSH A. BHAGWAT
Professor of Law
UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102
(415) 565-4600

ERWIN CHEMERINSKY
Alston & Bird Professor of Law and Political Science
DUKE LAW SCHOOL
Science Drive and Towerview Road
Durham, NC 27708
(919) 613-7173

MICHAEL C. DORF
Michael L. Sovern Professor of Law
COLUMBIA LAW SCHOOL
435 W. 116th Street
New York, NY 10027
(212) 854-2672

KERMIT ROOSEVELT
Assistant Professor of Law
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-8775